International Hat Company, a wholly-owned subsidiary of Interco Incorporated *and* Tex Barnes. Case 14-CA-16407

28 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 3 August 1983 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified herein and to adopt the recommended Order as modified.

The judge found inter alia that the Respondent violated Section 8(a)(3) and (1) of the Act by implementing changes in piece rates and cutting methods in August and November 1982 which had the effect of reducing the wages of employee Tex Barnes, a leading protagonist of the Union. We agree with the judge that the record clearly shows that the Respondent regarded Barnes as a "troublemaker" because of his prominent role as a union adherent and that it sought to punish him by reducing his earnings as a cutter. However insofar as the judge indicates that the changes in cutting methods were instituted for the purpose of bringing about lesser earnings for Barnes, we deem it unnecessary to pass on the legitimacy of those changes. The vice of the Respondent's conduct was in utilizing its new cutting methods and its manner of compensation to penalize Barnes for his union activities by setting his rates at a level which substantially decreased his earnings below those he was receiving before August 1982. Accordingly we adopt the judge's recommendation that Barnes be made whole for the wages lost since that date and we shall also require that the Respondent increase Barnes' rate of pay in an amount which will restore his earnings to the level existing before August 1982. However, we disagree with and shall not adopt the remedial order of the judge to the extent that it provides for the restoration of the cutting methods and manner of compensation for cutters that prevailed before August 1982.

CONCLUSIONS OF LAW

Substitute the following for paragraph 3.

"3. By setting Tex Barnes' rates at a level that substantially decreases his earnings below what he was receiving before August 1982 for the purpose of discouraging union membership and activity by its employees the Respondent violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Hat Company, a wholly-owned subsidiary of Interco Incorporated, Piedmont, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Setting rates for cutters at a level that substantially decrease their earnings below those received before August 1982 for the purpose of discouraging union membership or activities by its employees."

2. Substitute the following for paragraphs 2(a) and (b).

"(a) Make Tex Barnes whole for all wages lost subsequent to the reduction in his earnings since August 1982, plus interest.

"(b) Increase the rate of pay for Tex Barnes in an amount which will restore his earnings to the level existing before August 1982."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in or activity on behalf of Southwest Regional Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, or any other labor organization by issuing written warnings to employees for that purpose or by setting rates for cutters which substantially decrease their earnings below those received before the changes made in August 1982.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide Tex Barnes with backpay for all wages lost as a result of the changes made in and subsequent to August 1982, with interest.

WE WILL increase the rate of pay for Tex Barnes in an amount which will restore his earnings to the level existing before August 1982.

WE WILL notify Tex Barnes that we have removed from our files any reference to the written warning issued 15 December 1982, and notify him in writing that this has been done and that evidence of this warning will not be used as a basis for future personnel actions against him in any way.

INTERNATIONAL HAT COMPANY, A WHOLLY-OWNED SUBSIDIARY OF INTERCO INCORPORATED

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was heard before me in St. Louis, Missouri, on June 6, 1983, pursuant to charges filed and served on January 6, 1983, and complaint issued on February 11, 1983. The complaint alleges that the Respondent issued oral and written warnings to Tex Barnes and changed its piece rate system, thereby reducing his wages. The General Counsel contends the warnings and rate change were effected because Barnes engaged in activities protected by the Act. The Respondent denies the commission of unfair labor practices.

On the entire record, my observation of the witnesses' demeanor as they testified before me, and the post-trial briefs filed by the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The pleadings establish that the Respondent, a manufacturer of hats and caps, meets Board and statutory standards for the assertion of jurisdiction, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act, as amended.

II. LABOR ORGANIZATION

Southwest Regional Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. Union activity and the Respondent's knowledge thereof and reaction thereto

The Union commenced an organizing drive in the spring of 1979 at the Respondent's several hat manufacturing plants in Missouri, including the Piedmont, Missouri plant where Tex Barnes works as a cutter. Barnes was the principal employee organizer for the Union at Piedmont and busied himself in procuring signed union authoriation cards from employees, handing out union literature, and actively and persistenly campaigning among the employees on behalf of the Union. He served as union observer at a representation election conducted by the Board at the Piedmont plant on May 25, 1979. Challenged ballots were determinative. After a recount on October 4, 1979, showing a majority of the voting employees had voted against the Union, a rerun election was held after an investigatory hearing conducted by the Board wherein Barnes and other employees testified on behalf of the Union and against the Respondent. Barnes continued to support the Union and became a member of the Union's negotiating committee and the acting union steward after the Union was certified by the Board, pursuant to the rerun election on April 3, 1980, as the collective-bargaining representative of certain of the Respondent's Piedmont employees. Subsequently, a decertification petition was filed with the Board. Barnes then exerted his efforts to persuade employees to vote in favor of the Union. The decertification election was conducted on March 4, 1982, and the Union lost.

During the Union's campaign preceding the May 1979 election, George Davis, then the assistant plant manager, asked Barnes if he had attended a union meeting and if he knew who did. After Barnes denied he had, but named one or more employees who did attend, Davis asked why Barnes wanted the Union. The reply was better benefits and more pay. Although this 1979 colloquy was long before the events alleged in the complaint it does illustrate that the Respondent was early aware of Barnes' support of the Union.

Further uncontroverted evidence that Tex Barnes' union support was known to the Respondent, as well as evidence that the Respondent resented that support, was given by George Davis who became plant manager in November 1979 and was later discharged on July 23, 1982.[1]

In October 1979, at the Board hearing resulting in the April 1980 rerun election Joe Polniewaz, the Respondent's personnel director and its admitted supervisor and agent, asked Davis how Barnes and other employees testifying at the hearing stood with respect to the Union and specifically why Barnes was for the Union. Davis opined that Barnes was seeking more money. Shortly after Davis became plant manager in November 1979, Polniewaz told Davis he could not understand why Barnes would be for the Union in view of his high earnings, expressed the view that Barnes was a troublemaker whose views about the Union could not be changed, and asked Davis how to get rid of Barnes and employees Thurman, Teal, and Wells.[2] Davis and Polniewaz had

[1] Davis was a somewhat nervous witness who admittedly had some psychological problems, but there was no indication he was fabricating his testimony. On the whole, he was believable, and the failure of the Respondent to proffer witnesses contradicting his damaging testimony lends some support to his credibility. His statements were neither transparently false nor improbable, and I discern no hint that his testimony was constructed to wreak revenge upon the Respondent because his employment had been terminated. I credit him.

[2] Wells and Thurman have since left the Respondent for reasons apparently unconnected with their union activity. Teal is still employed.

essentially the same conversation about Barnes several times from October or November 1981 until about the time of the March 1982 decertification election. During the course of these discussions Davis, in response to the question on how to get rid of Barnes, advised Polniewaz that the way to accomplish Barnes' departure would be to hurt him financially so that Barnes would quit. Davis and Polniewaz also discussed the possibility of moving Barnes' job to another company plant in Oran or Lutesville, Missouri. Finally, after the March 1982 election Polniewaz told Davis that if Davis did not get rid of Barnes there would be another election and he (Polniewaz) and Barnes would probably lose their jobs.

The views of Polniewaz with regard to Barnes were shared by Goodson, the Respondent's president. In February 1981, after discussing the future decertification election, he told Davis that Barnes was an s.o.b. and that he wanted to know how to get rid of him. There is no evidence that Goodson had any reason other than Barnes' union activity to so label Barnes or so fervently desire to get rid of him, but there is credible testimony from Barnes that he contradicted Goodson at a meeting of the Respondent's employees prior to the first election when Goodson was giving his opinion of the Union in an effort to dissuade employees from voting for it. Neither Goodson nor Polniewaz testified. Polniewaz was terminated on April 30, 1983, for economic reasons.

A continuing concern of the Respondent with respect to union activity is demonstrated by the reason given George Davis for his termination on July 23, 1982. Richard May, the Respondent's general manager and admitted statutory supervisory and agent, told Davis there would be more "Union problems" if Davis stayed.

2. Wage changes

The Respondent's Piedmont plant manufactures baseball type and knit caps, the baseball type predominating. Tex Barnes is the sole cutter at the plant, except for brief periods when a part-time cutter has been employed. The cutter's job is essentially one of utilizing metal dies to cut cap sections from cloth. Each cap requires several different sections. The cloth comes to him in multiple layers, called plies by the cognoscenti in the trade, which are prepared by an employee known as a spreader. The number of plies may vary from a dozen or less to as many as 72.

Barnes has been a cutter at Piedmont since 1977, and the Respondent acknowledges his superior capabilities. Until November 1982 his wages were calculated on the basis of the number of dozens of cap parts he cut multiplied by the piece rate of the particular part being cut. There were different rates for different cap sections. In addition to this basic computation he was paid double the rate when he cut 25 dozen or less of any cap part. This double rate had been in effect for about 2 years. Prior to that time he was paid double for 24 dozen or less. There are some items that are not on the piece rate schedule. For these he was paid "average pay," an hourly rate based on Barnes' average hourly earnings at piece work over a preceding 3-month period. This rate was refigured from time to time. When not performing cutting work he was in the past and continues to be paid $3.45 per hour.

During the 3 months, January through March 1982, Barnes averaged $8.84 per hour earnings. The Respondent used this period to arrive at the "average pay" the month of June 1982. Barnes' "average pay" for the period encompassing July through September 1982 was $6.14. For October through December of the same year it was $4.91. A careful reading of the record persuades me that there is insufficient evidence to determine with exactitude the reasons for this falloff in "average pay." Possible contributing factors might have been an increasing amount of cutting of parts carrying a lesser piece rate, a decrease in cutting needed, a greater number of cuts of lesser ply, mechanical problems, absences from work, and any number of other causes, but the evidence does not reveal that any of these speculative possibilities in fact occurred. The Respondent's asserted impression that the dropoff was due to Barnes' deliberately slowing down on the job or absenting himself from his machine more than usual is unsupported by probative evidence.

The record does show, however, some specific changes that would predictably affect Barnes' earnings. The first occurred when Barnes returned from vacation in August 1982. He was then told by his supervisor, who is also his wife, that he would no longer receive double pay for cutting lots of 25 dozen or less. The effect of this change on Barnes future income is illustrated by the testimony of Marvin Leibach that the Respondent now receives more small orders than previously. A couple of days later Barnes asked General Manager May for an explanation. May replied that there never had been anything sent to the Respondent's St. Louis office, its headquarters, showing the double rate had been paid. The Respondent does not explain, either by evidence or in its brief, the reasons for this rate change. May's statement to Barnes is no explanation at all.

Barnes was also instructed in August 1982 to cut the exact ply set forth in the cutting rate schedules previously furnished to Barnes and his spreader, the employee who prepares the plies for him to cut. Prior to this time it was Barnes' practice, apparently approved by the Respondent, to cut any excess material in plies additional to those on the schedules. He received "average pay" for cutting this excess cloth.

Finally, effective November 29, 1982, the method of calculating Barnes' wages was altered. The former method of paying a rate per dozen was changed to one of reimbursing him 1.9 cents per cut, regardless of ply. Cutters at the Respondent's Oran and Lutesville, Missouri plants continued to be paid on the basis of dozens of pieces cut, and their "average pay" never fell in 1982, and in fact all exceed that of Barnes during the October through December period. During the January through March period, Barnes' "average pay" had exceeded that of the highest paid cutter or spreader at the other two plants by $2.67. The "average pay" of two cutters or spreaders at the Lutesville plant exceeded Barnes' over the July through September period. Every spreader and cutter had a higher "average pay" than Barnes during

the October through December period, ranging from 49 cents to $2.17 per hour higher.

Jim McGlynn, the Respondent's cost accounting manager, testified that he went to the Lutesville plant in August 1981 in an effort to discover how to lower the cost of production and thus be more competitive. According to McGlynn and Richard May, the Respondent's general managers, they discovered inefficient and wasteful cutting methods at Lutesville. Still in August 1981, George Davis and Erlene Barnes, the cutting supervisors, were called to the Lutesville plant where McGlynn, after some discussion on changing the cutting method, gave Davis and Barnes the task of setting up a cutting system that would not waste material. Davis credibly testified that McGlynn said he wanted to standardize operations at Lutesville and Piedmont by putting them on the same cutting allowances, same method of operation, and same type of cost sheet. McGlynn claims that it was decided to concentrate on Piedmont because the business was falling off badly there, but not at Lutesville. No records were proffered to support this assertion. At any rate, Davis and Barnes were unable to come up with a new cutting method. Davis so advised McGlynn in July 1982 and requested his assistance. McGlynn examined the July cutting records in August and observed that Piedmont was not cutting according to standard schedule. It is difficult to believe this was a new or startling revelation in view of Barnes' established practice, which the Respondent must have been well acquainted with, of cutting additional cap pieces from the excess material after completing the scheduled cuts. It seems probable, and I find, that McGlynn was responsible, after he scrutinized the July records, for the order to Barnes in August to cut only to schedule. McGlynn also computed three purportedly efficient ways to lay out material and thereby secure the schedule number of cuts. He testified that this would save $80,000 a year. With respect to the rates, he asserts that the new method of spreading and cutting would render the existing rate system too cumbersome because a tremendous increase in the number of rates would be necessary. Accordingly, he explains that he deduced from the records that Barnes could make 300 cuts an hour, which would, at 1.9 cents per cut, give him an hourly wage of $5.70. McGlynn further testified that Barnes could earn $6.88 or $6.70 or $6.80 per hour by making 348 cuts, inasmuch as the July records showed Barnes had a high production of 348 dozen. The problem with this latter conclusion is that Barnes was being reimbursed by the dozen in July, not by the cut, and 348 dozen is not necessarily, indeed not likely, synonomous with 348 cuts. McGlynn neither explained this reasoning nor did the Respondent produce the July records on which the calculations were purportedly based. McGlynn says 1.9 cents was a temporary rate which could be adjusted up or down later, and that $5.70 would put Barnes in the middle wage range of all the Respondent's cutters. Prior to the quarter within which the August changes in Barnes' reimbursement took effect he earned far more than any other cutter and the $5.70 rate is even less than his average pay for that July through September 1982 quarter.

About October 8, 1982, Richard May told Barnes that his rate would be temporarily changed to 1.9 cents per cut, subject to review if it did not produce enough earnings for him. May concedes he has not compared Barnes' wage on the basis of what he would have earned under the old method as compared to the new method, and cannot say whether Barnes would have made more under the old or new methods.

On October 11, 1982, Rayfield, Barnes' spreader, told Barnes that Rayfield's rate was going to be $5 an hour, a 47-cent reduction from his earlier average wage.

About October 13, Barnes asked May if what Rayfield had said was true. He further told May that 1.9 cents for cutting was too low a rate. May said McGlynn had set the rate, not him. He agreed the rate was too low, but advised Barnes that he might have to deny that he had said it was too low. The new rate of 1.9 cents went into effect on November 29, 1982. This rate has never been reviewed and remains in effect.

Barnes produced his personal record of cutting performed on May 20, 1983, together with a calculation of the amount he would have received had he been paid on the basis of dozens cut. This document was received in evidence as an example of how the two methods of reimbursement result in different wages for the same work. The Respondent proffers no evidence or persuasive argument that the caculations and the cutting rate sheets for 1981 and 1982 which were placed in evidence shows that Barnes would have earned approximately 70 percent more in wages on May 20, 1983, had his pay been calculated on the method in effect until November 29, 1982. This of course does not establish that the same ratio would apply every workday because the type of the cut and thus the rates are subject to fluctuation. The comparison is, however, persuasive evidence of a severe adverse effect on Barnes' earnings caused by the new method of calculating those earnings.

The Oran and Lutesville cutters are still paid at the per dozen rate McGlynn's explanation that the new system, which he maintains to be the most efficient, was not put in at Lutesville because the charge in the instant case was filed a little over 30 days after the system was installed at Piedmont is not persuasive. The change was implemented on November 29, 1982, and the charge in this case was filed January 6, 1983, but the change in cutting methods and wage rate computation was announced to Barnes by May on October 8 or 9, 1982, 3 months before the charge was filed, ample time to review, alter if necessary, and implement at Lutesville if the Respondent intended to do so.

3. The warnings

The Respondent admits the complaint allegations that an oral warning was issued to Barnes "in or about" late November 1982, and a written warning issued on December 15, 1982.

With respect to the oral warning General Manager May convincingly testified that it came about under the following circumstances. At the time the Respondent was utilizing a second cutter on a part-time basis. Barnes, the senior man, had requested that the larger spreads of

cloth be put on his table, and the smaller spreads be given to the other cutter. The Respondent had acceded to his request. On the day of the "warning," the sewing lines, which relied on the cutters for materials, were running short of materials. May went to the cutting area. He observed that Barnes was absent and his table had little if anything on it, indicating that Barnes was caught up with the work provided him. May, with the assistance of Erlene Barnes, supervisor of cutting and Tex Barnes' wife, moved spreads from the other cutter's table to Barnes' table in order to keep Barnes busy and produce enough to keep the sewing lines in materials. May's credible testimony[3] on what then occurred is as follows:

> And Tex came back and in a rather boisterous way said, "You know, what are you doing, throwing all them little spreads over here?" And I don't remember the exact conversation other than that didn't set well with me because I was a lot—under a lot of pressure as far as trying to keep the lines going anyway.
>
> I said, "Yeah, we're trying to keep you out of the bathroom." I said, "We need the work and need you out here working and not—not sitting in there." And he said, "Well, can't a guy go to the bathroom if, you know, if he needs to go to the bathroom?"
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> And I said, "If you've got a problem, it seems like you're going an awful lot. And I said, 'You need—you need to be staying out here where you—need to be and getting your work done instead of sitting in there in the can." And that's I won't say I said those exact words like that, but that's—that's about the sum and substance of the conversation.

Some time after this confrontation, May told Plant Manager Householder that if Barnes were spending too much time in the bathroom to get it down in black and white and talk to Barnes about it. Householder thereafter watched Barnes and took notes of his absences from his machine on four different days. On November 30, 1982, he noted that Barnes took seven unscheduled breaks of 13, 7, 8, 5, 10, 17, and 9 minutes' duration, respectively. On December 2, Householder noted two breaks of 5 and 8 minutes between the hours of 7:15 and 9:50 a.m. The notes indicate three unscheduled breaks on December 9 of 11, 14, and 15 minutes, respectively. Finally, on December 10, Barnes worked a calculator at the supervisor's desk for 21 minutes, and took seven unscheduled breaks of 15, 22, 7, 14, 5, 13, and 8 minutes between 8 a.m. and 2:30 p.m. There is no showing the use of the calculator was not work related. In any event, Householder prepared a written warning notice to Barnes which noted, under the heading *Nature of Violation*, "production too low" and further noting in the remarks section that Barnes had taken excessive time in the bathroom and shipping department away from the cutting machine. This warning was dated December 15, 1982. Householder then called Barnes into the office and presented him with the warning. Barnes protested the low production notation on the ground he had in fact made his piece rate. Householder first disagreed, but then agreed after reviewing some records adding, however, that Barnes had been away from his machine too much. Householder did not rescind the warning.

The week after receiving the written warning, Barnes pointed out that the company handbook required that a written warning be preceded by an oral warning. Householder replied that May's earlier comments to Barnes which are related above were the oral warning.

There are written rules on taking breaks, but they were not produced, requested, or proffered by any party. Whatever they are it is clear they have long and consistently been honored in the breach. Ken Parker, Davis' predecessor as plant manager, had told Barnes to take as many breaks as he needed. Davis told Barnes in November 1981 that it was alright to take breaks when he was caught up, but should take them in the bathroom rather than in the plant where he could be seen or in shipping where others were working. According to Davis, whom I credit, Tex Barnes took a break about every hour, other employees took more breaks than the plant rules provided for, and neither he nor his predecessor Parker, under whom he was assistant plant manager from November 1977 until November 1979, criticized employees for this as long as they did work and had good production. Andrew Rayfield, who spreads cloth for Barnes to cut, stated that if he got caught up with his work and wanted a break he took one and drank coffee in the bathroom. Rayfield also agrees with Barnes, and I credit them, that during the week before Barnes received the written warning there was no heat in the plant, and that he, as did Barnes, took breaks to warm up. I credit Barnes that Rayfield took more breaks than he did because Rayfield conceded he did not know if Barnes took more or less breaks than he did, and because the Respondent's evidence does not show otherwise. Rayfield received no warnings even though Householder has seen him away from his area on unauthorized breaks, and the parties stipulated that no cutter or spreader other than Barnes received a written warning in the 3 years preceding December 15, 1982. There is no evidence that anyone but Barnes ever received either a written or oral warning for taking unauthorized breaks, and the written warning is in error to the extent it cites low production as a reason therefor. The only subject of the warning that might conceivably be contrary to the established lenient practice was Barnes' alleged presence in the shipping room. Householder's notes specifically reflect many visits to the bathroom but not one to the shipping area, nor does Householder testify to any such visit.

B. *Conclusions*

The August abolition of double rate reimbursement and the accompanying curtailment of "average pay" cutting of excess material, together with the November changes in cutting and reimbursement, all had an extremely adverse effect on Tex Barnes' income. The question is whether these changes, all fairly encompassed by complaint allegations, were instituted in order to carry out the plan suggested by Davis to Polniewaz as a

[3] To the extent Barnes' testimony appears to contradict that of May on this incident Barnes is not credited.

device to cause Barnes to quit. The General Counsel has made out a strong prima facie case that they were implementations of that plan. Barnes was a leading union protagonist throughout the Union's organizational drive and the election campaigns at Piedmont from the spring of 1979 through March 4, 1982. The Respondent knew this, resented it, and sought ways to cause the termination of Barnes' employment. Even after the Union lost the decertification election in March 1982, the Respondent, by Personnel Director Polniewaz, pressed Plant Manager Davis to get rid of Barnes in order to avoid another election. The Respondent's hostility to union activity continued through July 1982, as shown by Richard May's statements to Davis indicating an apprehension of more "Union problems" if Davis remained employed. There is no evidence that the Respondent's bitterness toward Tex Barnes because of his union activity ever abated. May's July 23, 1982 statements expressing a desire to avoid future union problems, when considered in context with the previously expressed desires of Polniewaz and the Respondent's president Goodson, during the active union campaign to find ways to get rid of Barnes and the repetition of this desire by Polniewaz after the Union was decertified, persuade me that the Respondent's attitude toward the Union in general and Tex Barnes in particular had not mellowed. The concentration of the various changes in reimbursement on Barnes resulting in the adverse effect on his wages is consistent with Davis' suggestion to Polniewaz that the way to get rid of Barnes was to hurt him financially to the extent that he would quit. The Respondent's failure to review the "temporary" rate or to apply it to Lutesville, the very place the Respondent avers it discovered the problem of excess waste material which caused the change in reimbursement method, seriously erode the Respondent's bona fides in the matter. Moreover, its failure to proffer any evidence on the August termination of double pay for short lots leaves it no affirmative defense on that subject, and its failure to support its various testimonial assertions with respect to comparative profitability, competiveness in the market, productivity, and material waste with company records which presumably were available to the Respondent diminishes the probative weight of that testimony.

The General Counsel has established a prima facie case that the Respondent, because of Tex Barnes' union activity and in order to discourage such activity by its employees, made August and November 1982 changes in its piece rate system designed to reduce Barnes' pay to the point he would be required to quit. The reasons advanced by the Respondent for the change in piece rate on November 29, 1982, are not inherently unreasonable, but the Respondent has simply not proffered or adduced sufficient convincing evidence that the changes affecting only one cutter would have taken place in the absence of the protected activity and the Respondent's enduring hostility thereto. The evidence in favor of the complaint allegation with respect to the changes in the piece rate system preponderates over that to the contrary. Accordingly, I find the abolition of the double reimbursement policy and the cutting of excess material for "average pay" in August 1982 and the change to a piece rate of 1.9 cents per cut on November 19, 1982, were unlawfully motivated and violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

May's comments to Barnes in late November 1982, which has been alleged and admitted to be an oral warning, were nothing more than spontaneous utterances provoked by Barnes' challenging remarks at a time May was under pressure trying to keep the work flowing. I do not believe and do not find that there could be a reasonable conclusion May's statements were unlawfully motivated or had any reasonable tendency to interfere with, restrain, or coerce employees in the exercise of Section 7 rights.

The written warning requires closer scrutiny because it resulted from a planned surveillance of Barnes' breaktaking habits. May instructed Plant Manager Householder to document any excessive amounts of time Barnes might spend in the bathroom, and talk to Barnes about it.[4] This was not an instruction to issue a written warning. Householder nevertheless issued such a warning. I have no doubt the notations compiled by Householder of Barnes' absence from his work station are correct. There is nothing instrinsically improper or unlawful in the issuance of a written warning or checking on an employee's work habits, but there are factors in this case which require a finding of illegality. The warning itself erroneously alleges low production, and there is no evidence to support the allegation that Barnes was spending time in the shipping area. Moreover, it appears several of the absences noted were caused by lack of heat in the plant. No written warnings had been issued to any cutter or spreader in the Company's plant during the preceding 3 years. Rayfield, the spreader who lays out Barnes' material, was absent from the area as frequently, if not more, during the week preceding the warning, but received no warning, oral or written. Rayfield asserts that Householder observed his absences, and I am persuaded that Householder must have been aware of Rayfield's absences because Rayfield works immediately adjacent to Barnes whom Householder was making a point of watching. I note that if the spreader does not work the cutter cannot work. It would thus appear that the absence of the spreader is as significant as the absence of the cutter. The abrupt departure from past practice with respect to breaks only as to Barnes is unexplained by Householder except for a bare recitation that his notes of the absences are correct. Considering the foregoing facts in the context of continuing hostility toward union activity and reduction of Barnes' earnings for unlawful reasons, it seems probable that the disparate treatment of Barnes was motivated by a desire to harass him by means in addition to the wage reduction which had not produced the desired result, his termination, and thereby either hasten his departure or discourage union membership or activity by him and other employees who could not help but take note of the treatment accorded only to a leading union adherent. Accordingly, I find the issuance of the written warning violated Section 8(a)(3) and

[4] I do not credit Householder's denial that he made his observations at anyone's request. May's version is credited.

(1) of the Act. This is not to say that the Respondent may not, in the exercise of reasonable business judgment and with proper notice, enforce the written break rules so long as such enforcement has no unlawful motivation or is not effected in such a manner as to interfere with, restrain, or coerce its employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act, as amended.

CONCLUSIONS OF LAW

1. International Hat Company, a wholly-owned subsidiary of Interco Incorporated, herein called the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By implementing changes in piece rates and cutting methods, which had the effect of reducing the wages of Tex Barnes, for the purpose of discouraging union membership and activities by its employees, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By issuing a written warning to Tex Barnes on December 15, 1982, for the purpose of discouraging union membership and activity by its employees, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in any other unfair labor practices alleged in the complaint.

THE REMEDY

In addition to the usual cease-and-desist notice posting provisions my recommended order will require the Respondent to make Tex Barnes whole for all wages lost as the result of the August 1982 elimination of double pay for cutting cap pieces in lots of 25 dozen or less, the August 1982 elimination of excess material cutting at "average pay," and the November 29, 1982 change in piece rates, with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[5] My order will also require the Respondent to reinstate the double pay provision and excess material cutting at "average pay" practice which were in effet prior to the August 1982 changes, and the piece rate schedule in effect prior to November 29, 1982, and to rescind and expunge from its files any reference to the written warning issued to Tex Barnes on December 15, 1982, and notify him in writing that this has been done and that evidence of this unlawful warning will not be used as a basis for future personnel actions against him.

On the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended[6]

ORDER

The Respondent, International Hat Company, an wholly-owned subsidiary of Interco Incorporated Piedmont, Missouri, its agents, officers, successors, and assigns, shall

1. Cease and desist from

(a) Issuing written warnings to its employees in order to discourage union membership or activities by its employees.

(b) Implementing changes in its piece rates or cutting methods for the purpose of discouraging union membership or activities by its employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Make Tex Barnes whole for all wages lost as a result of the August 1982 elimination of double pay for cutting cap pieces in lots of 25 dozen or less, the August 1982 elimination of excess material cutting at "average pay," and the November 29, 1982 change in piece rates discrimination against him in the manner set forth "The Remedy" section of this Decision.

(b) Reinstate said double pay provision, excess material cutting at "average pay," and the piece rate schedule in effect prior to November 29, 1982.

(c) Rescind and expunge from its files any reference to the written warning issued to Tex Barnes on December 15, 1982, and notify him in writing that this has been done and that evidence of this unlawful warning will not be used as a basis for future personnel actions against him.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Piedmont, Missouri facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."